Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Applications Filed For Consent To Transfer	)	WC Docket No. 06-106
Control Of Mobile Satellite Ventures	)	DA 06-06-1254
Subsidiary LLC From Motient Corporation And	)	
Subsidiaries To SkyTerra Communications, Inc.	)	

REPLY TO OPPOSITIONS TO COMMENTS OF HIGHLAND CAPITAL MANAGEMENT, LP

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SUMMARY

Highland* replies herein to the oppositions to Highland's initial comments that were filed by Motient and SkyTerra. Highland demonstrates that Motient's opposition consists of undeveloped bullet points that are merely misleading conclusions, proffered without supporting evidence. Next, Highland explains that Motient's discussion of Highland's acquisition of ICO shares is deliberately misleading and factually wrong.

Highland then describes how SkyTerra's opposition is likewise wholly based on misstatements and mischaracterizations of the facts and issues raised in Highland's comments, such that it should be disregarded. Finally, Highland shows that SkyTerra fails to rebut Highland's contention that the Applicants have not provided any support for their conclusory statements that the transaction is in the public interest.

Accordingly, Highland renews its request for the Commission thoroughly to investigate and evaluate all relevant aspects of the public interest implications of the proposed transaction before reaching a decision on the underlying Application.

* All abbreviations used in the Summary are explained in the text of the reply.

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I. INTRODUCTION

Highland Capital Management, LP ("Highland"), by its undersigned attorneys, hereby submits its reply to the oppositions ("Oppositions") to Highland's comments ("Comments") that were filed by Motient Corporation ("Motient")[1] and SkyTerra Communications, Inc. ("SkyTerra")[2] on July 27, 2006, in the instant proceeding.[3]

In their Oppositions, both Motient and SkyTerra (collectively, "Applicants") have attempted to divert the Commission's attention away from the points raised in Highland's Comments by mischaracterizing the purpose of Highland's inclusion of references to activities in other fora as an effort on Highland's part improperly to bring contractual, shareholder or

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[1] *Opposition to Comments of Highland Capital Management, LP*, filed by Motient, Jul. 27, 2006 ("Motient Opposition").

[2] *Opposition to Comments*, filed by SkyTerra, Jul. 27, 2006 ("SkyTerra Opposition").

[3] *See Applications Filed for Consent to Transfer Control of Mobile Satellite Ventures Subsidiary LLC from Motient Corporation and Subsidiaries to SkyTerra Communications, Inc.*, Public Notice, WC Docket No. 06-106, rel. Jun. 16, 2006 (the several applications that were jointly and simultaneously filed by the Applicants are referred to collectively herein as the "Application").

securities law disputes before the Commission.[4] Highland has made no such effort, nor has it requested any relief from the Commission that is properly to be granted by a court or other competent body.

Rather, Highland has merely, and properly, requested "a full and complete investigation of the public interest implications of the proposed transaction,"[5] and, to that end, has sought to place into the record before the Commission a number of facts that are relevant to such an investigation -- facts that are conspicuous by their absence in any of the Applicants' filings (for example, the weakened financial condition in which TerreStar Networks Inc. ("TerreStar") would be left as a direct result of the proposed transaction, *see* discussion *infra*).[6]

In the context of Highland's request for a full and complete investigation into the proposed transaction's public interest implications, Highland referenced in its Comments its proxy contest and various court filings only to demonstrate: a) the extraordinary measures that Highland, as one of the largest shareholders and long-time investors in Motient, has had to take in an effort to obtain information about the transaction that is now before the Commission, and b) to illustrate the nature and kinds of information that will soon be available to the Commission as a result of the discovery process in a pending court action between Highland and Motient, *Highland Crusader Offshore Partners, L.P., et al. v. Motient Corporation, et al.*, Cause No. D-1-GN-06-002219 (District Court of Travis County, TX, 53rd Judicial District), filed June 19, 2006 ("Travis County Litigation"). Given the vigorous efforts on the part of the Applicants to

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[4] Motient Opposition at 2; SkyTerra Opposition at 3-5.

[5] Highland Comments at 15.

[6] As pointed out in Highland's Comments, as a result of the proposed transaction, ownership of MSV would be consolidated under SkyTerra and ownership of TerreStar would be consolidated under Motient.

mischaracterize Highland's inclusion of information about its activities in other fora and refusal to address any of the substantive points raised in Highland's Comments, one can only wonder what the Applicants have to fear from a full and complete investigation by the Commission into the proposed transaction.

Against the backdrop of this general rejoinder, Highland addresses the specific points raised in the Applicants' Oppositions.

II. DISCUSSION

A. The Motient Opposition

1. Motient's Undeveloped Bullet Points, Like Statements Made In The Public Interest Section Of The Application, Are Merely Misleading Conclusions, Proffered As Fact Without Any Support.

The substance of Motient's Opposition consists of five bullet points, each containing one or two unsupported statements, and a single paragraph reporting on an additional fact to which Motient attempts to attach significance by insinuation, as discussed in Section II.A.2, below.[7]

At its first bullet, Motient states, without elaboration, that "Highland has provided no information that is material to the Commission's deliberations." Motient Opposition at 1.

In fact, Highland, in its Comments, provided evidence, *inter alia*, that: a) the proposed transaction is one that, as Motient itself has conceded, will impact *both* Mobile Satellite Ventures Subsidiary, LLC ("MSV"), the MSS/ATC L-Band licensee that is the subject of the instant Application, *and* TerreStar, which, together with its Canadian partner, TMI Communications and

[7] Motient attaches to its Opposition a copy of its "Opposition to Motion to Accept Late-Filed Comments," which it filed in this proceeding on July 20, 2006. Highland intends to reply to that pleading, and to any other oppositions to Highland's motion that may be filed, in a single reply that will be submitted after the time for filing oppositions to Highland's motion has expired, as provided in the Commission's rules. *See* 47 C.F.R. §1.45(b) and (c).

Company, LP, is building out an S-Band MSS/ATC network;[8] b) that TerreStar, because of its role in the utilization of recently-harmonized spectrum at 2 GHz, including its position as the partner of one of only two U.S.-authorized service providers at 2 GHz, represents an important Commission interest whose success or failure can hasten or delay specific goals under the Communications Act, namely, competition, national security, public safety and rural/remote access to communications services;[9] c) that Motient itself has stated that TerreStar may not be able to meet its cash deficit in 2006;[10] d) that Motient may (or may not) decide to support TerreStar's funding obligations;[11] and e) that Motient has stated that it will incur a $50 - $80

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[8] Highland Comments at 3, citing Motient's press release announcing the transaction.

[9] Highland Comments at 4-7, 9, 12. *See Constellation, LLC, Carlyle PanAmSat I, LLC, Carlyle PanAmSat II, LLC, PEP PAS, LLC, and PEOP PAS, LLC, Transferors and Intelsat Holdings, Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp*, Memorandum Opinion and Order, IB Docket No. 05-290, at ¶17, rel. Jun. 19, 2006 (hereinafter "*PanAmSat Order*"), which states in relevant part:

> "Pursuant to section 310(d) of the Communications Act, we must determine whether the Applicants have demonstrated that the proposed transfer of control . . . will serve the public interest, convenience, and necessity. In making this determination, we first assess whether the proposed transaction complies with section 310(d), other applicable statutes, and the Commission's rules. If the transaction does not violate a statute or rule, we next consider whether it could result in public interest harms *by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes*. We then employ a balancing process *weighing any potential public interest harms of the proposed transaction* against any potential public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. If we find that the proposed transaction does not serve the public interest for any reason, or if the record presents a substantial and material question of fact, we would designate the application for hearing under section 309(e) of the Act." (Emphasis added.)

[10] Highland Comments at 10, citing Motient's 10Q for the period ended December 31, 2005, at 36-37.

[11] Highland Comments at 10-11, citing Motient's 10K for the year ended December 31, 2005, at 59.

million corporate tax liability as a direct result of the proposed transaction, and, therefore, may be *unable* to fund TerreStar as a direct result of the proposed transaction.[12] Given the Commission's duty to weigh transaction-specific public-interest benefits against potential harms to the public interest, these facts, provided by Highland and unrebutted by the Applicants, are indeed material to the Commission's deliberations.

Motient's second bullet states that Highland's information is inaccurate, but Motient offers no clue as to where the claimed inaccuracy might lie.

Motient drops a footnote to this second bullet, which makes another unsupported and conclusory statement: Motient states that the transaction "will ensure that a single, public, stockholder will manage financial arrangements, allowing TerreStar greater ability to access the capital markets and strengthen its cash position."[13] Nowhere does Motient explain *how* management by a single, public, stockholder will improve TerreStar's ability to access the capital markets (after all, TerreStar is already majority owned by Motient, a single, public, stockholder), or otherwise demonstrate how this proposed change is a benefit that is in any way related to the public interest. *Cf.* Highland's Comments at 8, discussing similar deficiencies in the Applicants' description of purported public interest benefits to MSV.

Motient's third bullet asserts that the Applicants "have demonstrated that the proposed transaction, by rationalizing MSV's ownership structure, will enable MSV to attract capital more easily and will facilitate MSV's efforts to enter into strategic partnerships. Highland has shown

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[12] Highland Comments at 11, citing Motient's 10Q for the period ended March 31, 2006, at 36 and Motient's 8K, filed May 9, 2006 (announcement of the proposed transaction). Additionally, Motient's 8-K/A, filed July 14, 2006, estimates that the proposed transaction will generate corporate taxes of $65 million and cash transaction costs of $9 million. As of March 31, 2006, Motient had only $67 million in cash.

[13] Motient Opposition at 2, fn. 2.

nothing to the contrary." Motient Opposition at 1. This claim is similar to the conclusory statements made in the public interest section of the Application (and in the footnote to Motient's second bullet with respect to TerreStar, discussed in the preceding paragraph). The actual evidence, however, as proferred by Highland in its Comments, is that Motient, to other audiences, has stated that "Both companies [MSV and TerreStar] have **strong existing sponsorship.**"[14]

Given Motient's propensity, as demonstrated by Highland, to say whatever suits its purposes under the circumstances, Highland quite properly requested that the Commission insist that the Applicants "substantiate their position with facts and not allow them merely to rely on unsupported rhetoric regarding possible public interest benefits that might flow from the proposed transaction."[15] In fact, the Applicants have not shown how the proposed transaction will in any way improve MSV's ability to attract capital or enter into strategic partnerships, and they certainly have not shown that the claimed benefit outweighs the potential harms to TerreStar set out in Highland's comments and ignored by Motient in its Opposition.

Motient's fourth bullet, in an apparent attempt to dissuade the Commission from considering probative points that Motient is unable to rebut, states, without citing to a single authority, that any potential impact on TerreStar is irrelevant to the Commission's consideration of whether the proposed transfer of control of MSV is in the public interest. Moreover, Motient chides Highland for suggesting otherwise because Highland should know that TerreStar is not a party to the MSV transfer of control Application.[16]

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[14] Highland Comments at 7-8, quoting Motient's June, 2006 Investor Presentation; emphasis in original.

[15] Highland Comments at 8.

[16] Motient Opposition at 2.

Indeed, Highland is well aware that TerreStar is not a party to the Application. Highland is also aware that the law is quite to the contrary of what Motient attempts to imply. In truth, the Commission is obligated by its own precedent to consider the points Highland makes in its Comments regarding the potential adverse impact on TerreStar, and thus to competition in the relevant market, that could result if this transfer of control is approved. The Commission's ability to consider the public interest implications of the transaction underlying a transfer of control application is quite broad and is in no way restricted solely to a consideration of the proposed transaction's effect on parties to the application, especially where the transaction may affect competition in a particular market or market segment.[17] Thus, Motient, together with SkyTerra, *see* discussion below, are quite wrong in their insistence that any possible impact on TerreStar is simply irrelevant to the Commission's deliberations in the instant proceeding.

Motient's reference to "[n]ewly discovered information" under its fourth bullet is discussed in the next section of this Reply.

Finally, Motient's fifth bullet seeks to mischaracterize Highland's reference to its pending litigation. Highland has addressed this issue in the introductory section of this Reply.

2. Motient's Discussion Of Highland's Acquisition Of ICO Shares Is Deliberately Misleading And Factually Wrong.

Motient reports the substance of a public filing made by Highland on July 24, 2006, and characterizes it as "newly discovered information" – implying that the information in question

[17] *See, e.g., PanAmSat Order*, at 18 ("The Commission's public interest evaluation necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.") *See also, id.* at ¶¶ 19-20 (distinguishing the Commission's public interest analysis from traditional antitrust analysis and noting that the Commission's analysis includes national security, law enforcement and other public interest considerations, including *inter alia* "the regulatory policies that govern the interactions of industry players" and the transaction's "effect on future competition").

had been somehow hidden.[18] The referenced information is that Highland recently acquired public equity in ICO Global Communications (Holdings) Limited ("ICO").[19] Motient proffers this information in an effort to show that the acquisition: a) "makes particularly disingenuous Highland's expressed concern for TerreStar's future"; b) "may well give Highland an interest in complicating the business plans of MSV and TerreStar"; and c) was not disclosed in Highland's comments.[20]

Motient is once again relying on bald assertions – and, in this case, insinuation – to make up for its lack of facts and solid reasoning. To begin with, Highland did not mention the acquisition of ICO shares because it is totally irrelevant to the Application pending before the Commission. Moreover, Highland has been an ICO investor for more than seven years, which is substantially the same amount of time it has been an investor in Motient. Additionally, the numerous purchases of ICO shares Highland has made over the years include only Class A shares (one vote per share) and not the Class B shares (10 votes per share) that have "supermajority" voting control, as the Applicants should be well-aware; thus, the purchases, by the nature of the securities in question, entail no possibility for control of ICO by Highland. In short, purchases of ICO by Highland only serve to demonstrate Highland's belief in the long-term value of, and willingness to invest in, the MSS/ATC space … and nothing more.

It also bears noting that Motient incorrectly cited Highland's disclosure statement, describing it as a Schedule 13D disclosure, which is required to be filed by any investor that acquires more than 5% of a publicly held company, *unless the investor is eligible to use a 13G*

[18] Highland's filing was made, pursuant to SEC requirements, within 10 days after ICO became a "public" company on July 14, 2006.

[19] Motient Opposition at 2.

[20] *Id.*

filing instead. In fact, Highland filed a Schedule 13G. One of the qualifications for using a Schedule 13G is that the filer be "passive", which means that the filer has not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with, or as a participant in, any transaction having that purpose or effect.[21] Motient, as a publicly-traded company, should be well aware of the difference between a 13D and a 13G filing, so one has to wonder whether it is Motient or Highland that is being disingenuous.[22]

Finally, Motient would have the Commission believe that there is something nefarious or otherwise improper about an investor with a large stake in a particular technology taking a smaller passive stake in a competing company, and yet Motient has, for years, held interests in an L-Band MSS provider (MSV) and a competing[23] S-Band MSS provider (TerreStar).

Furthermore, Motient makes its implicit accusation in the course of requesting that the Commission approve a transaction involving and benefitting Apollo Funds ("Apollo"). Not only is Apollo the largest investor in SkyTerra (68% beneficial ownership as of July 28, 2006), and not only would it hold three out of potentially as few as four seats on SkyTerra's Board if the

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[21] *See* Rules 13d-1(b)-(c) of the Securities Exchange Act of 1934, Fed. Sec. L. Rep. (CCH) ¶ 26,850.

[22] Indeed, with respect to Motient's insinuation that Highland was trying to play "hide the ball" with the Commission by not disclosing the information in its 13G filing, Highland points out that it was the Applicants themselves who told the Commission, in the Application they filed on May 17, 2006, that they were ahead of their milestones, when in point of fact MSV was simultaneously concluding a contract re-negotiation that would cause it to *miss* its milestone and forfeit one of the licenses it originally sought to transfer, and to which its public interest statement applied. *See* discussion at Section II. B. 1., *infra.*

[23] Highland Comments at 6, fn. 11.

transaction is approved (with the ability to exercise control over the fourth seat),[24] but Apollo also owns 11.7% of TerreStar, while simultaneously having (through its ownership in SkyTerra and SkyTerra's ownership in MSV Investors) the right to determine the appointment of one of the eight seats on TerreStar's board. Apollo, through its ownership in SkyTerra and SkyTerra's ownership in MSV, currently has the right to appoint three seats on MSV's Board, despite indirectly owning only approximately 11% of MSV. In addition, Apollo controls Hughes

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[24] With three out of the present five, and potentially only four, board seats, Apollo arguably would exercise *de facto* control over SkyTerra following the proposed transaction, and, through SkyTerra, Apollo would arguably exercise *de facto* control over MSV, despite its having only a 16% - 25.8% equity interest in SkyTerra, as reported to the Commission by the Applicants in recent *ex parte* presentations. *See Lockheed Martin Corporation/Regulus, LLC and COMSAT Corporation; Application for Transfer of Control of COMSAT Government Systems, Inc., Holder of an International Section 214 Authorization and Earth Station Licenses E960186 and E960187; Lockheed Martin Corporation/Regulus, LLC; Application for Authority to Purchase and Hold Shares of Stock in COMSAT Corporation*, Memorandum, Order and Authorization, 14 FCC Rcd 15816, paras. 29-30, 32, rel.Sep.15, 1999 (discussing *de jure* v. *de facto* transfers of control, and noting that an unacceptable *de facto* transfer occurs when a minority shareholder has the power to dominate the management of corporate affairs). *See also* 47 C.F.R. §63.24(c), and note to paragraph (c), which states:

> "Because the issue of control inherently involves issues of fact, it must be determined on a case-by-case basis and may vary with the circumstances presented by each case. The factors relevant to a determination of control *in addition to equity ownership* include, but are not limited to the following: *power to constitute or appoint more than fifty percent of the board of directors or partnership management committee*; authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; *ability to play an integral role in major management decisions of the licensee*; authority to pay financial obligations, including expenses arising out of operations; ability to receive monies and profits from the facility's operations; and unfettered use of all facilities and equipment." (Emphasis added.)

See also 47 C.F.R. § 25.119 (transfers of control of satellite licenses requiring Commission approval include any change in the party controlling the affairs of the licensee), *and see* 47 C.F.R. §1.948 (regarding transfers of control in the wireless services, and stating that the Commission will consider "the relationships of the owners" in determining whether interests that do not exceed 50% are controlling). Highland notes that, although the Applicants have filed their Application to transfer control of MSV from Motient to SkyTerra, the party that will be in control of MSV after the transaction will be Apollo.

Communications, Inc. (67.3% ownership as of March 29, 2006), the 100% owner of the company (Hughes Network Systems) with which TerreStar has entered into a $38 million contract to build TerreStar's ground-based satellite beam access subsystem.[25]

Highland notes that Apollo's overlapping and – as Motient undoubtedly would characterize them, given Motient's statements about Highland's investments -- conflicting investment interests in the MSS space do not appear to have been disclosed to the Commission by the Applicants. Given Apollo's outright and apparent control of various parties to the proposed transaction, with Board representation in both MSV and MSV's prospective parent (SkyTerra), in TerreStar, and in a major TerreStar contractor, there would appear to be a greater ability and incentive for Apollo to "complicat[e] the business plans of MSV and TerreStar" than there would be for Highland to do so as a result of its passive investment in ICO. Motient's and SkyTerra's failure to juxtapose these entanglements against Highland's long-term investments is disingenuous at best, if not an overt attempt to mislead the Commission.

B. The SkyTerra Opposition

1. SkyTerra's Opposition Is Likewise Wholly Based On Misstatements And Mischaracterizations Of The Facts And The Issues Raised In Highland's Comments, And Should Be Disregarded.

SkyTerra opens its Opposition to Highland's Comments with a brief reference to the Application filed on May 17, 2006, dropping a footnote to reference the fact that one of the licenses in the original application was surrendered on June 12, 2006, and that the Applicants subsequently withdrew the transfer of control application that pertained to the surrendered license.[26] Omitted from this recitation of the facts surrounding the filing of the Application on

[25] *See* Motient 10K for the year ended December 31, 2005, pp. 5 and fn.42.

[26] SkyTerra Opposition at 1-2, fns. 1, 3.

May 17, 2006, is the fact that the Applicants rested much of the public interest statement in their Application on the significance of a contract entered into by MSV and Boeing in January, 2006, coupled with the statement that "MSV is *ahead* of the Commission's milestone schedule and is planning to launch *these* satellites beginning in 2009"[27] – "these satellites" included at the time the statement was made the South American satellite licensed to MSV International, LLC ("MSVI"), a sister company of MSV, and one of the original parties to the Application.

However, in a notice that MSV issued to its noteholders on May 24, 2006, one week after filing its Application with the Commission, MSV disclosed that it had amended the contract with Boeing via a letter agreement signed on May 19, 2006 (suggesting that the negotiations for the letter agreement and the preparation of the Application were going on simultaneously), and that, as a result of amending the contract, MSVI would *miss* its milestone and likely would have to surrender its license for the South American satellite and incur a $2.25 million bond forfeiture.[28] Although in its Opposition SkyTerra makes reference to the fact that MSVI's license was indeed surrendered in June, it offers no explanation for the Applicants' misrepresentation of MSVI's milestone status as of May 17, when the Application was filed. If the Applicants were willing to make such a significant misrepresentation of the facts in the public interest section of their Application, the Commission should be especially careful in accepting other statements proffered by the Applicants regarding the purported public interest benefits of their proposed transaction.

SkyTerra introduces the substance of its Opposition by stating that Highland's Comments are "focused on a private dispute," SkyTerra Opposition at 1-2, and that "it is well established that the [Commission] is not the appropriate forum for the resolution of private disputes." *Id.* In

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[27] Application at 6–7 (emphasis added).

[28] *See* Highland's Comments at 7-8, fn. 15.

fact, Highland's Comments are focused on the public interest and the Commission's public interest inquiry into the proposed transaction that underlies the Application before it. As discussed above, Highland nowhere asks the Commission to resolve or opine on any aspect of Highland's private litigation with Motient, nor does it seek any other relief that would be more appropriate to pursue in another forum.

Again, after a brief outline of the proposed transaction in its "Background" section,[29] SkyTerra states that Highland filed suit against Motient in Travis County, Texas, and then launches into its first substantive section, which declares that Highland's pending litigation is not relevant to the Commission's consideration of the transaction, stating, in the very first sentence of this section: "In large part, Highland focuses its Comments on a private dispute between Highland and Motient."[30] For the reasons stated in the Introduction, this is simply wrong.

Having opened with a false premise, SkyTerra's Opposition has nowhere to go but downhill. SkyTerra continues: "Specifically, Highland asks the Bureau to defer action on the Application pending the outcome of [the Travis County Litigation]."[31] Highland did no such thing. Highland's purpose in filing its Comments was to inject into the record facts and

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[29] SkyTerra also briefly addresses Highland's Motion to Accept Late-Filed Comments in a footnote (fn. 5) to its Background section, citing to Section 1.46(b) of the Commission's rules, 47 C.F.R.§1.46(b) (as does Motient, in its Opposition to Motion to Accept Late-Filed Comments, at 2, fn. 6). The Applicants both misstate and misapply the rule: Rule 1.46(b) explains how the Commission will handle emergency requests for extensions of time submitted less than seven days in advance of the filing date, which is the cut-off for filing requests for extensions of time in notice and comment rulemakings. However, the rule goes on to state, "*and [the Commission] will consider motions for acceptance of comments*, reply comments or other filings made *after* the filing date." Emphasis added. Highland filed a Motion to Accept Late-Filed Comments in an application proceeding -- it did not file a late-filed Motion for Extension of Time in a rulemaking. Thus, the Applicants' contention that an emergency situation is required for the Commission to grant the relief requested here is simply wrong.

[30] SkyTerra Opposition at 3.

[31] *Id.*

information concerning the proposed transaction that the Applicants conveniently or purposefully omitted from their own filings, in order to ensure that the Commission would have a full and complete record on which to base its public interest findings.

In accordance with this purpose, Highland advised the Commission of an expedited discovery schedule in the Travis County Litigation, which, but for Motient's subsequent procedural maneuvering, would have provided the Commission, by late August, with access to highly relevant documents, interrogatory answers and deposition testimony, as referenced in Section II.B. of Highland's Comments, as well as with access to relevant facts that would have emerged at a September 5 hearing on Highland's request for a temporary injunction and at an October 16, 2006 trial on the merits of Highland's request for permanent injunction and rescission of the agreement underlying the Application pending before the Commission.[32]

Highland is well aware that the Commission has the resources to investigate and develop any line of inquiry that would help further its goals and purposes, but those resources are not unlimited. By advising the Commission of the kinds of additional evidence that soon should be available to it through activities in other fora, Highland merely presented the Commission with information to consider in deciding how best to deploy its own limited resources to develop the facts it needs in order to decide whether the proposed transaction is, or is not, truly in the public interest, or whether to conserve those resources, at least in part, and obtain relevant facts from the public record in other proceedings, without causing undue delay to the Applicants. At no time did Highland request that the Commission "delay action on the Application pending the outcome of the Travis County Court case."[33]

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[32] As discussed more fully below, Motient's subsequent removal of the case to federal court will delay these dates.

[33] SkyTerra Opposition at 4. In light of SkyTerra's claim in its Opposition that Highland is

In its zeal to depict Highland's Comments as an effort to get the Commission to adjudicate "legal claims involving a private dispute," SkyTerra next endeavors to re-characterize Highland's Comments as an attempt to raise character issues going to SkyTerra's basic qualifications to control a Commission licensee. SkyTerra Opposition at 3-4. This is a bizarre non-sequiter. Applicant qualifications, which are nowhere mentioned as such in Highland's Comments (but perhaps should have been – see discussion below), are only one part of the Commission's broader public interest analysis. As mentioned above, that analysis also includes an evaluation of a proposed transaction's competitive effects,[34] and Highland's Comments provide information concerning the proposed transaction's effect on the competitive landscape in the provision of MSS/ATC (*i.e.*, the potential weakening of one of the competitors).

Highland notes that the Commission will consider character issues in evaluating basic qualifications if it can be shown that a court has found that the applicant has violated the Commission's rules or other laws.[35] As no court has yet adjudicated Highland's claims that Motient is in violation of a federal statute, specifically, the Investment Company Act of 1940

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improperly seeking to delay the Commission's processing of the transfer of control application, Highland notes that, to the contrary, Highland has taken all available steps to *expedite* a resolution of its dispute with Motient in the Travis County Litigation. If there has been any effort to delay such a resolution, that effort lies with Motient, whose apparent strategy in removing that litigation to federal court (*see* Highland Comments at 13, fn. 22) was to delay the expedited late-August discovery schedule in that case, perhaps in the hope that the Commission would approve Motient's Application and that it could get its deal closed before its responses to Highland's discovery requests in the Travis County Litigation could become part of the public record.

[34] *See supra* text at 6-8 and fn. 9.

[35] *See, e.g., General Motors Corporation and The News Corporation Limited, General Motors Corporation and Hughes Electronics Corporation, TransferorsAnd The News Corporation Limited, Transferee,For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, para. 23 rel. Jan. 14, 2004 (noting that the Commission will consider certain forms of adjudicated non-FCC conduct as having a bearing on its confidence in an applicant's willingness to comply with FCC rules and policies).

("ICA"),[36] and because such a violation, even if adjudicated, is not the type of violation with which the Commission is normally concerned, Highland did not raise the '40 Act issue before the Commission.[37]

Highland further notes, however, that both Motient and SkyTerra *themselves* have stated in filings with the SEC that they may be in violation of the ICA. SkyTerra specifically states in its filings that its stake in MSV is its largest asset, and if that asset is deemed to be an investment security under the ICA, SkyTerra would – in addition to facing possible civil and criminal penalties – either have to make a large offsetting acquisition or sell off a portion of its stake in MSV, with no guarantee that it could successfully complete either such transaction.[38]

Contrary to the Applicants' assertions, Highland is not asking the Commission to resolve the issue of whether SkyTerra (or Motient, for that matter) is in violation of the ICA, but, in the event that the Commission is inclined, after a full review of the relevant facts, to grant the pending Application, the Commission may wish to consider conditioning its consent to the proposed transfer of control on a resolution by SkyTerra of its status under the ICA, in order to avoid any possibility of post-transaction disruption to MSV's business and operations.

2. Skyterra Fails To Rebut Highland's Contention That The Applicants Have Not Provided Any Support For Their Conclusory Statements That The Transaction Is In The Public Interest.

In the second substantive section of its Opposition, SkyTerra claims that Highland has not presented any issues other than those pertaining to its private dispute that are relevant to the Commission's review of the Application, and that Highland has not demonstrated that the

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[36] *See* SkyTerra Opposition at fn. 11

[37] This issue, among others, is, however, at the heart of the Travis County Litigation.

[38] *See* excerpt from SkyTerra's Form 10K for the year ended December 31, 2005, attached hereto as Exhibit A.

proposed transaction will harm the public interest. This is yet another attempt by SkyTerra to set up a straw-man argument based on a misstatement of the record.

SkyTerra drops a footnote in support of its position that Highland has failed to show any public interest harm that states, "Highland asserts that the Transaction is not in the public interest because Motient did not submit it to shareholder vote and thus the Transaction 'exemplifies the mismanagement that Highland was seeking to address through its proxy contest.'" SkyTerra Opposition at 6.

Highland made no such assertion. Highland pointed out in the introduction to its Comments that the proposed transaction, which resembles a game of corporate musical chairs that the Applicants are attempting to rush through the Commission without close examination, represents a "substantial change in Motient's structure and asset base," and pointed out, as well, that the fact that this substantial change was not submitted to a shareholder vote "exemplifies the mismanagement that Highland was seeking to address through its proxy contest." Comments at 2. Highland nowhere stated that the transaction is not in the public interest *because* it was not subjected to a shareholder vote, nor, as SkyTerra erroneously states later in the same footnote, did Highland anywhere "claim that Motient was required to obtain shareholder approval for the transaction."

Highland, in its Comments, unambiguously states the reason for its concern for the public interest implications of the transaction in the paragraph that follows the quoted language, specifically, the Applicants' failure to provide sufficient information to the Commission or to Highland (one of Motient's largest shareholders and, as such, an entity that should have ready access to such information) to enable the Commission to make an informed determination as to whether the transaction is, or is not, in the public interest. *Id.*

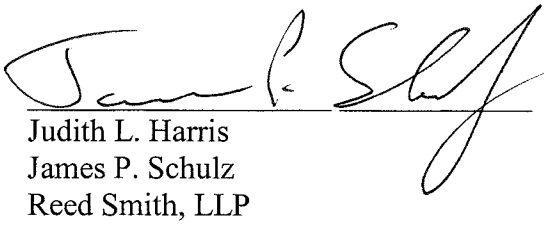
In this regard, Highland notes that SkyTerra, like Motient, *see* text at 7-8, *supra*, has made no effort in its Opposition to counter Highland's demonstration that the proposed transaction will very likely leave TerreStar (and Motient for that matter) illiquid. Instead, SkyTerra merely echoes and reiterates the same conclusory statements made by Motient (that any consideration of the transaction's effects on TerreStar are irrelevant; that the transaction is in the public interest because it will somehow, through some unexplained process, improve MSV's access to capital, etc.). To the extent SkyTerra is merely repeating these naked assertions, Highland has already addressed in its reply to Motient's Opposition, above, and in Highland's Comments, the need for such conclusory statements to be supported with facts.

III. CONCLUSION

The Applicants' Oppositions fail to address the serious concerns raised in Highland's Comments, and, instead, attempt through misstatement and mischaracterization to divert the Commission's attention away from both: (a) a full evaluation of the public interest benefits that the Applicants insist will flow from the transaction if it is consummated; and (b) from consideration of any possible public interest harms that could result. While vigorously attacking

Highland's Comments with straw-man arguments, the Applicants have done nothing to demonstrate that the proposed transaction is indeed in the public interest, and, accordingly, Highland renews its request for the Commission thoroughly to investigate and evaluate all relevant aspects of the public interest implications of the proposed transaction before deciding whether to grant the pending Application.

Respectfully submitted,



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Dated: August 1, 2006

EXHIBIT A

10-K 1 d10k.htm FORM 10-K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-K

☒ Annual report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2005, or

☐ Transition report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the transition period from to

Commission file number 000-13865

SKYTERRA COMMUNICATIONS, INC.

(Exact name of registrant as specified in its charter)

Delaware	**23-2368845**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification Number)
19 West 44th Street, Suite 507 **New York, New York** (Address of principal executive offices)	**10036** (Zip Code)

Registrant's telephone number, including area code: (212) 730-7540

Securities registered pursuant to Section 12(b) of the Act: None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock, $.01 par value

(Title of Class)

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

Yes ☐ No ☒

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or 15(d) of the Act.

Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter periods that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the registrant's knowledge, in the definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer (as defined in Rule 12b-2 of the Act).

Large accelerated filer ☐ Accelerated filer ☒ Non-accelerated filer ☐

Indicate by check mark whether the registrant is a shell company (as defined in defined in Rule 12b-2 of the Act).

Yes ☐ No ☒

Anti-takeover provisions could make a third-party acquisition of our company difficult.

We are a Delaware corporation. The Delaware General Corporation Law contains provisions that could make it more difficult for a third party to acquire control of our company. In addition, the holders of our preferred stock have certain rights which could prevent or impair the ability of a third party to acquire control of the company.

Shares eligible for future sale could cause our stock price to decline.

The market price of our common stock could decline as a result of future sales of substantial amounts of our common stock, or the perception that such sales could occur. Furthermore, our preferred stock and Series 1-A and 2-A warrants have the right to require us to register the shares of common stock underlying these securities, which may facilitate their sale of shares in the public market. The future sale of substantial amounts of our common stock pursuant to any such registration statements could have an adverse impact on our stock price.

We may suffer adverse consequences if we are deemed to be an investment company.

We may suffer adverse consequences if we are deemed to be an investment company under the Investment Company Act of 1940. A company may be deemed to be an investment company if it owns investment securities with a value exceeding 40% of its total assets, subject to certain exclusions. Some investments made by us may constitute investment securities under the Investment Company Act of 1940. If we were to be deemed an investment company, we would become subject to registration and regulation as an investment company under the Investment Company Act of 1940. If we failed to do so, we would be prohibited from engaging in business or issuing our securities and might be subject to civil and criminal penalties for noncompliance. In addition, certain of our contracts might be voidable, and a court-appointed receiver could take control of our company and liquidate our business. If we registered as an investment company, we would be subject to restrictions regarding our operations, investments, capital structure, governance and reporting of our results of operations, among other things, and our ability to operate as we have in the past would be adversely affected.

Although we believe that our investment securities currently do not comprise more than 40% of our total assets, this view is dependent upon our belief that our largest asset, our stake in the MSV Joint Venture, is not an investment security. Should that interest be deemed to be an investment security, then unless an exclusion or safe harbor were available to us, in certain circumstances, we would have to either attempt to purchase operations or business sufficiently large to offset such treatment or, alternatively, reduce our ownership of the MSV Joint Venture as a percentage of our total assets in order to avoid becoming subject to the requirements of the Investment Company Act of 1940. There can be no assurances that such transactions, to the extent necessary, could be consummated on satisfactory terms, if at all, and that such transactions would not have an adverse effect on us and the price of our common stock. In addition, contractual or legal restrictions could impair our ability to consummate such a transaction. Moreover, we could incur significant tax liabilities in connection with any such actions.

Compliance with changing regulation of corporate governance and public disclosure may result in additional expenses.

Changing laws, regulations and standards relating to corporate governance and public disclosure, including the Sarbanes-Oxley Act of 2002, is creating uncertainty for companies such as ours. We are committed to maintaining high standards of corporate governance and public disclosure. As a result, we intend to invest reasonably necessary resources to comply with evolving standards, and this investment may result in increased general and administrative expenses and a diversion of management time and attention from assisting the MSV Joint Venture in revenue-generating activities to compliance activities, which could harm our business prospects.

In accordance with the provisions of 47 C.F.R. §1.4~~6~~(e), I certify that a copy of the foregoing was sent to the following on August 1, 2006:

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